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**BURGER-FISCHER V. DEGUSSA AG: U.S. COURTS ALLOW SIEMENS  
AND DEGUSSA TO PROFIT FROM HOLOCAUST SLAVE LABOR**

*Kara C. Ryf*<sup>\*</sup>

*“Contrary to the arrogantly expressed position . . . of the representatives of German industry, these are claims that are not and cannot be barred by time or technicality. These are claims which are not requests for charity, for voluntary gestures of good will or for humanitarian assistance for the needy. . . . The claims asserted . . . are founded on the historical fact that slave and forced laborers were called and treated by the German economy as “beasts, barbarians and subhumans” solely because of who they were in a bizarre and distorted scale of racial hierarchy . . . . These offenses violated the most basic elements of universal legal norms.”<sup>1</sup>*

**INTRODUCTION**

Zelig Preis was only eighteen-years-old when he was forced to work as a slave laborer for Siemens,<sup>2</sup> Germany’s largest electronics and communications manufacturer.<sup>3</sup> Siemens acquired Preis and thousands of other laborers from Nazi concentration camps to assist in the company’s production of war-related equipment.<sup>4</sup> Siemens subjected its laborers to the

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<sup>1</sup> Michael Hausfeld, Remarks at Washington D.C. Conference on Slave and Forced Labor (May 12, 1999) (transcript available at Cohen Milstein – In the News (visited Sept. 29, 2000) <<http://www.cmht.com/ipMDHspeech.htm>>). Hausfeld was one of the lawyers that represented plaintiffs in *Burger-Fischer v. Degussa AG*.

<sup>2</sup> See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 253 (D.N.J. 1999).

<sup>3</sup> See BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* 117 (1979).

<sup>4</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 262-63; see also *Weekend All Things Considered*, (NPR radio broadcast, Sept. 6, 1998); FERENCZ, *supra* note 3, at 24.

most detestable living and working conditions imaginable.<sup>5</sup> They slept in wooden bunks with three others in a barracks lacking heat, light, water, sewage facilities, and protection from the rain.<sup>6</sup> Preis was awakened at 5:00 a.m. and forced to walk six miles to a construction site where he labored ten to twelve hours a day under the constant threat of being beaten, executed, or taken to the gas chambers at Auschwitz.<sup>7</sup>

Preis' story is representative of close to 100,000 slave laborers employed by Siemens during the Holocaust<sup>8</sup> and of approximately eight to ten million people who were forced to work for industries throughout Germany during the war.<sup>9</sup> An arrangement with the Nazi government allowed companies to reap the benefits of drawing on a large labor pool<sup>10</sup> without cost. Because most Germans were engaged in fighting the war<sup>11</sup> and concentration camp inmates were not paid,<sup>12</sup> these companies were able to profit and emerge from the war as successful corporations. As a direct result of these atrocities many corporations such as BMW, Siemens, Volkswagen and DaimlerChrysler largely avoided the economic devastation plaguing most of postwar Germany.<sup>13</sup>

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<sup>5</sup> See FERENCZ, *supra* note 3, at 117 (stating that in 1946 Hermann von Siemens articulated that camp inmates were happy to have the opportunity to work at Siemens and that if people were not adequately fed or mistreated he was not aware).

<sup>6</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 253.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.* at 254.

<sup>9</sup> See Michael J. Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 612 (1999); see also Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 193 n. 789 (2000) ("The number of companies which used slave labor exceeded 20,000. According to Ulrich Herbert, the foremost expert on the subject, there wasn't a company in Germany with more than 10 employees which didn't use slave or forced labor. There were also many with fewer than 10 employees which did. There were even numerous households with slave laborers as maids and butlers."). For a complete list of German Firms that employed slave laborers, see Cohen, Milstein, Hansfield & Toll's e-journal, *Forced Labor Atrocities* (visited Oct. 9, 2000) <[http://www.cmht.com/slave\\_labor/companies.htm](http://www.cmht.com/slave_labor/companies.htm)>.

<sup>10</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 253.

<sup>11</sup> See *id.* at 263.

<sup>12</sup> See *id.* at 253-54.

<sup>13</sup> See *id.* at 271; see also Senator Tom Hayden, *Ex-slave Laborers Deserve Far Better; Rich Firms Get Good Press with Token Payments, but What About the Victims?* L.A. TIMES, Dec. 30, 1999 at 11 (giving an example of how companies that exploited slave laborers, such as BMW, Volkswagen, Siemens and DaimlerChrysler, have maintained respectable corporate images).

Over the past fifty years German industries have paid only nominal amounts to slave labor victims,<sup>14</sup> and most victims have not received any compensation.<sup>15</sup> Finally, in an effort to compensate the 700,000 to 1.6 million slave labor survivors,<sup>16</sup> negotiations to design a settlement fund began in early 1999 between eight nations.<sup>17</sup> The parties involved included the United States, Germany, representatives from German industry, class action lawyers and Jewish organizations. On December 14, 1999, the parties agreed to establish<sup>18</sup> the *Initiative for Responsibility, Remembrance and the Future*, compensation fund.<sup>19</sup> The fund, signed on July 17, 2000, will provide close to one million former slave laborers, victims of confiscated property, and persons wrongly denied insurance claims, with \$4.8 billion.<sup>20</sup>

Forced labor survivors including Zelig Preis and the other plaintiffs in the class action law suit *Burger-Fischer v. Degussa AG*,<sup>21</sup> will receive less than \$5,000 each from this fund.<sup>22</sup> The settlement absolves all

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<sup>14</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 271; see also FERENCZ, *supra* note 3, at 209-11 (depicting in chart format the number of claimants paid per country by Siemens, I.G. Farben, Krupp, A.E.G. and Rheinmetall).

<sup>15</sup> See FERENCZ, *supra* note 3, at 127.

<sup>16</sup> See Bazyler, *supra* note 9, at 613. See also William Drozdiak, *Holocaust Survivors Face Delay in Compensation Victims, German Firms Break Off Negotiations*, WASH. POST, Aug. 27, 1999, at A24 (estimating 1.5 to 2.3 million living slave laborers).

<sup>17</sup> See Stuart Eizenstat, Remarks on Holocaust Survivors (May 12, 1999) (transcript available at 1999 WL 18310462). Participating countries include the United States, Germany, Russia, Poland, Czech Republic, Belarus, Ukraine and Israel. *Id.*

<sup>18</sup> See *A Slave Labor Settlement*, ECONOMIST, Dec. 18, 1999, at 44.

<sup>19</sup> See Carol J. Williams, *Germany Pledges \$5.2 Billion for Slave Laborers; Pact: Joint State-Industry Compensation Fund Will Shield Companies from Further Lawsuits by Those Who Were Forced to Work for the Nazis*, L. A. TIMES, Dec. 18, 1999, at A4.

<sup>20</sup> See Marilyn Henry, *US and Germany Agree on Terms for 'Legal Peace' on Slave Labor Claims*, JERUSALEM POST, June 14, 2000, at 7, available in LEXIS, News Library; see also *German Slave and Forced Labor Settlement*, (visited Sept. 23, 2000) <<http://www.cmht.com/gsfsettle.htm>>.

<sup>21</sup> The Burger-Fischer case involves four class action law suits brought by former slave laborers against two defendants, Degussa and Siemens. "Degussa is charged with having refined the gold seized from inmates of the Nazi concentration camps with knowledge of its source, with use of slave labor and with having manufactured Zyklon B used in the notorious gas chambers of Auschwitz and other concentration camps. Siemens is charged with having made extensive use of slave laborers furnished to it by the Nazi regime during World War II." *Burger-Fischer*, 65 F. Supp. 2d at 250. See also Bazyler, *supra* note 9, 1, at 226 n. 980.

<sup>22</sup> Heirs of former slave laborers will not be eligible to receive a distribution from the compensation fund unless the former laborer was alive as of February 16, 1999. See Cohen, Milstein, Hansfield & Toll's e-journal, *German Slave and Forced Labor Settlement* (visited Oct. 7, 2000) <<http://www.cmht.com/gsfsettle.htm>>.

participating industries from any current or future war related legal claims,<sup>23</sup> thereby rendering the claims of Preis and other plaintiffs moot.<sup>24</sup>

Nonetheless, *Burger-Fischer* is still a very important case in several key respects. Until the filing of Holocaust litigation in United States courts, the industries have been able to deny their use of slave labor and cooperation with the Nazi regime.<sup>25</sup> The filing of the law suits brought the corporations' atrocities to the attention of the world, thereby pushing industries to settle claims in order to avoid a plethora of litigation and continued tarnishing of their corporate images.<sup>26</sup>

Further, the suits against the German industry sparked companies in other countries to also confront their past and prompted governmental action. In July 2000, Austria passed legislation to compensate former slave laborers through a settlement funded by the Austrian government and industry.<sup>27</sup> Additionally, United States corporations that operated plants in Nazi Germany are attempting to prevent class action lawsuits by establishing a compensation fund under the U.S. Chamber of Commerce.<sup>28</sup> U.S. companies that used slave laborers in their German subsidiaries include Ford, General Motors, Exxon-Mobil and Kodak.<sup>29</sup>

Despite these efforts, the court's dismissal of *Burger-Fischer* adversely effected holocaust victims. While the filing of litigation may have encouraged industries to establish a settlement fund, the court's verdict in favor of the defendant-corporations greatly strengthened the industries' bargaining power in the international settlement fund negotiations.<sup>30</sup> Dismissing the case as nonjusticiable set a precedent rendering it more difficult for future holocaust litigants to prevail in U.S. courts. With a decreased chance of litigation and adverse judgments, German industries had less incentive to establish a compensation fund,

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<sup>23</sup> See *A Slave-Labor Settlement*, *supra* note 18, at 44.

<sup>24</sup> Because the U.S. judiciary is an independent body the U.S. government cannot provide the German industry with an ironclad guarantee that participation in the settlement fund will shield the companies from future litigation in U.S. courts. However, the U.S. government will make an effort to prevent states from sanctioning the German companies. Additionally, the German industries and the class action lawyers plan to jointly seek dismissal of approximately fifty pending lawsuits. See *German Industry Faces Up to Past*, BUS. DAY (S. Afr.), Aug. 1, 2000, at 13; see also Henry, *supra* note 20, at 7.

<sup>25</sup> See Bazyler, *supra* note 9, at 234.

<sup>26</sup> See *id.*

<sup>27</sup> See *Austrian Slave and Forced Labor Settlement*, (visited Aug. 7, 2000) <<http://www.cmht.com/aussettle.htm>>.

<sup>28</sup> See Joseph Kahn, *U.S. Firms Plan Fund for Victims of Nazis*, CHI. TRIB., Apr. 30, 2000, at 11.

<sup>29</sup> See *id.*

<sup>30</sup> See *California Suits Target Japanese Corporations for Forced Labor and Mistreatment of Civilians During World War II*, 16 INT'L ENFORCEMENT L. REP. 574 (2000).

especially at a high dollar amount. The precedent that the *Burger-Fischer* court creates also renders it more difficult for other uncompensated Holocaust victims, such as those with slave labor claims against Japanese manufacturers, to recover.

In dismissing plaintiffs' claims against Degussa and Siemens, the United States District Court for the District of New Jersey denied compensation to the victims of one of the worst human rights abuses in history. This Note details three areas where the court's analysis is flawed. Section II describes the German industries' use of slave labor during World War II, focusing on Siemens. Because the court deemed the postwar treaties dispositive to the outcome of the case, Section III analyzes the agreements that have dealt with reparations from the end of the war until present. This section critiques three justifications for the *Burger-Fischer* decision. First, the court misinterpreted the postwar treaties. Second, the court improperly invoked the political question doctrine. Finally, the court's alleged inability to calculate damages is inconsistent with prior practice. Section IV concludes that the *Burger-Fischer* opinion and the settlement fund will have an adverse effect on future Holocaust and international human rights litigation.

## II. GERMAN INDUSTRIES' PARTICIPATION IN THE HOLOCAUST

During the Holocaust six million people died and \$230-\$320 billion in assets were stolen.<sup>31</sup> Although the German government paid more than \$54 billion to Holocaust victims since the postwar period, little if any of this money has gone to compensate slave laborers.<sup>32</sup> Germany maintains that it is the responsibility of industries to compensate<sup>33</sup> the eight to ten million people who were employed by private corporations during the war.<sup>34</sup> However, companies such as Siemens have stressed that they were obligated under the Nazi regime to employ slave laborers. Siemens has stated that the Nazis approached them requesting they employ slave laborers and that Siemens complied out of fear.<sup>35</sup> Therefore, they argue that it is the responsibility of the German government to provide restitution to the laborers.<sup>36</sup>

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<sup>31</sup> See Bazylar, *supra* note 9, at 602.

<sup>32</sup> See Burt Herman, *WWII Slave Labor Deal Sought*, ASSOC. PRESS, Aug. 27, 1999, available at 1999 WL 22038120.

<sup>33</sup> See Bazylar, *supra* note 9, at 613.

<sup>34</sup> See *id.* at 612.

<sup>35</sup> See *id.* at 613 (describing slave laborers' inability to collect reparations from the German government or to receive compensation from the industries); see also FERENCZ, *supra* note 3, at 120; Marguerite Reardon, *Siemens' Haunted History*, DATA COMMUNICATIONS, Aug. 7, 1999, at 53.

<sup>36</sup> See Daniel Johnson, *Comment: Germany Must Pay the Nazis' Slaves*, THE DAILY TELEGRAPH (LONDON), Dec. 7, 1999, at 22 (there are still approximately 2000 firms that

Overwhelming evidence reveals that Siemens' assertions are untrue.<sup>37</sup> In fact, Siemens played an active role in designing the slave labor program.<sup>38</sup> Siemens, like many other corporations, cooperated with Hitler's government in order to maintain an influential status in the German economy.<sup>39</sup> Often companies would arrange meetings with members of the Nazi government to determine the quantity of a specific good, such as trucks, tanks, barrels and other equipment needed to fight the war.<sup>40</sup> The company would then make a request for the number of laborers needed to manufacture the order.<sup>41</sup>

Because the bulk of the German work force fought in the war, many companies experienced a labor shortage.<sup>42</sup> Desperate for laborers, industries had to use all their influence to persuade the Nazi government for the privilege of using the concentration camp inmates.<sup>43</sup> Once the industries obtained the laborers their objective was to work the people to death.<sup>44</sup> Their only concern was to reap the benefits of the unpaid labor and position themselves to emerge from the war as a corporate powerhouse in an otherwise devastated postwar environment.<sup>45</sup>

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contend they were forced to employ slave laborers by the Nazi government and they are not legally culpable).

<sup>37</sup> See generally FERENCZ, *supra* note 3 (detailing an account of the slave labor program and the involvement of many of Germany's leading industries).

<sup>38</sup> See Reardon, *supra* note 35, at 55 (stating that three Siemens officials provided this information through affidavits at Nuremberg).

<sup>39</sup> See FERENCZ, *supra* note 3, at 24; see also CHRISTOPHER SIMPSON, *THE SPLENDID BLOND BEAST: MONEY, LAW AND GENOCIDE IN THE TWENTIETH CENTURY* 5 (1995).

<sup>40</sup> See *Weekend All Things Considered*, *supra* note 4.

<sup>41</sup> See *id.*

<sup>42</sup> See *Burger-Fischer v. Degussa AG.*, 65 F. Supp. 2d 248, 263 (D.N.J. 1999).

<sup>43</sup> See FERENCZ, *supra* note 3, at 24. ("An elaborate accounting system was set up to be sure that the companies paid the SS for every hour of skilled or unskilled labor and that deductions for the food provided by the companies did not exceed the maximum allowed. The inmates of course received nothing. They remained under the general control of the SS but under the immediate supervision of the companies that used them. The companies were required to see to it that adequate security arrangements, such as auxiliary guards and barbed wire enclosures, eliminated all possibilities of escape.").

<sup>44</sup> See *Weekend All Things Considered*, *supra* note 4.

<sup>45</sup> See Tamar Hausman, *WWII-era Slave Labor Profits Estimated at \$95b*, JERUSALEM POST, Nov. 15, 1999, at 2, available in LEXIS, News Library. It is estimated that German banks and industries profited \$95 billion by using slave labor during the war. The Foundation for Social History of the 20<sup>th</sup> Century came up with this figure after analyzing the balance sheets of Deutsche Bank, Dresdner Bank, Siemens, Allianz, Daimler, and BMW.

Siemens accomplished this objective.<sup>46</sup> After decades of denial and blame shifting, Siemens has paid only nominal amounts to the laborers they employed. Siemens has paid reparations only twice: once in 1961 and again in 1998, both of which were token payments amounting to only a minuscule fraction of their assets. In 1961, Siemens assets were \$1 billion and they paid only \$1.8 million in reparations, or 0.18 percent of the company's value.<sup>47</sup> Even worse, in 1998 Siemens' assets totaled \$42.3 billion and they paid \$11 million in reparations, or 0.03 percent of the company's value.<sup>48</sup> These payments did not come close to satisfying all claims and those who did receive money got less than \$825 a piece.<sup>49</sup>

Because payments have been insufficient and many victims have not been compensated, former slave laborers have filed lawsuits against German industries in U.S. courts. One may wonder why these claims are being brought now.<sup>50</sup> First, slave labor survivors, at an average age of 81, are dying at a rate of ten percent each year.<sup>51</sup> If these elderly claimants are

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<sup>46</sup> Siemens is currently the world's second largest electronics manufacturer. See FERENCZ, *supra* note 3, at 117.

<sup>47</sup> See Reardon, *supra* note 35, at 5; see also Hayden, *supra* note 13, at 11 (stating that other companies were successful during the war due to their employment of slave labor as well. For example, BMW quadrupled their profits during WWII by employing slave laborers from Dachau).

<sup>48</sup> See Reardon, *supra* note 35, at 58.

<sup>49</sup> See FERENCZ, *supra* note 3, at 117-127. Payments from Siemens came as they began to expand business into the New York market. Head officers of the company felt that a settlement with the New York Jewish organizations would be better for business. However, it was not until a document turned up illustrating Siemens' use of slave labor did the company offer to compensate victims. Even then Siemens maintained the position that they were forced to use labor from concentration camps and they did what they could to lessen the victim's suffering. Siemens' has explicitly expressed that the payments made were not due to "any moral or legal obligation." *Id.*; see also *60 Minutes: Holocaust Jews As Slave Labor During WWII and Whether it Compensates for Their Grief or Makes Them Look Money Hungry* (CBS television broadcast, June 27, 1999). A similarly low payment was made to slave laborers of Volkswagen. In 1980 the company admitted the role they played in the Holocaust and paid \$7 million to Eastern Europe and Jewish charities. However, the \$7 million was not enough. Anna Snopczyk, for example, was forced out of her Poland home and into the Volkswagen factory where she worked as a slave laborer for four years making weapons for the war. She received only \$400 in compensation. See also *CBS News This Morning: Federal Court Signals Legal Action Against Volkswagen for Atrocities*, (CBS television broadcast, May 5, 1999).

<sup>50</sup> Between the end of the war and 1996 only 10 holocaust related lawsuits were filed. Since 1996, victims have brought more than fifty lawsuits. See Bazyler, *supra* note 9, at 604-05.

<sup>51</sup> See Drozdiak, *supra* note 16, at A24. Drozdiak estimates that there are between 1.5 and 2.3 million slave laborers still alive. See *id.* Another source estimates the number between 700,000 and 1.6 million. See Bazyler, *supra* note 9, at 612-13.



to receive compensation for the suffering they endured, the filing of suits cannot be delayed.

Second, two cases opened the door for Holocaust related claims to be brought in U.S. courts. The first was *Filartiga v. Pena-Irala*,<sup>52</sup> a 1980 case that allowed a foreign plaintiff to recover in a U.S. court for human rights violations committed outside the United States.<sup>53</sup> Second, and most significant, were the class action lawsuits filed in 1996 and 1997 against the Swiss Banks for withholding assets deposited by Holocaust survivors and their families prior to the war.<sup>54</sup> This litigation resulted in a \$1.25 billion settlement for the victims.<sup>55</sup> Since this settlement, the number of lawsuits brought by slave labor victims has skyrocketed prompting the initial settlement fund offer of \$1.7 billion from the German Government and industry in February 1999.<sup>56</sup>

Finally, political and social changes, primarily in Eastern Europe,<sup>57</sup> have created a more conducive set of circumstances for the filing of Holocaust related claims. Documents essential to litigating such cases have just recently become available. The reunification of Germany and the fall of communism have opened archives providing access to previously hidden information related to the war<sup>58</sup> and have brought to light the active role of German industries in the slave labor program.<sup>59</sup>

### III. ANALYSIS OF POSTWAR REPARATION AGREEMENTS

The *Burger-Fischer* court stated three main factors for granting summary judgment in favor of the German industries. First, the court

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<sup>52</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>53</sup> *See id.* Plaintiffs successfully argued, under the Alien Tort Claims Act, that the former Inspector General of the police in Paraguay had tortured and killed their son in violation of the law of nations. *See also* Bazylar, *supra* note 9, at 605.

<sup>54</sup> *See* Stephanie A. Bilenker, Comment, *In Re Holocaust Victims' Assets Litigation: Do the U.S. Courts Have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?*, 21 MD. J. INT'L L. & TRADE 251 (1997).

<sup>55</sup> *See* Bazylar, *supra* note 9, at 614 (stating that the Swiss bank litigation encouraged the filing of law suits against corporations by former slave laborers); *see also* Verena Dobnick, *Terms Set in Agreement Between Swiss Banks and Holocaust Survivors*, ASSOC. PRESS, Jan. 23, 1999.

<sup>56</sup> *See* Bazylar, *supra* note 9, at 196; *see also id.* at 265-71, for a complete list of United States Holocaust Litigation including all slave labor claims.

<sup>57</sup> *See id.* at 606.

<sup>58</sup> *See* Bilenker, *supra* note 54, at 255.

<sup>59</sup> *See* FERENCZ, *supra* note 3, at 121. It was not until documentation of the atrocities committed by Siemens were made public that the company offered to compensate victims. *See generally* SIMPSON, *supra* note 39 (illustrating the United States' involvement in assisting Nazis and German corporate officers who employed slave laborers in their companies to escape liability, focusing on top United States and German officials and elites).

concluded that the postwar treaties, specifically the Transition Agreement and German legislation discussed below, subsumed plaintiffs' claims against Siemens and Degussa. Next, because the court viewed plaintiffs' case as a request to reformulate the postwar treaties, the court declined to adjudicate the case under the political question doctrine. The court stated that it did not have the power to alter treaties nor was it capable of calculating a damage award for plaintiffs.

This Note argues that the *Burger-Fischer* court dismissed plaintiffs' claims on three erroneous grounds.<sup>60</sup> In order to set the stage for these critical points, Part A will first provide an overview of the reparations treaties and the historical context in which they were negotiated. Part B discusses the court's misapplication of standard treaty interpretation principles and its improper conclusion that the Transition Agreement and German legislation subsumed all reparation issues. Part C states that the court improperly applied the political question doctrine to avoid adjudicating the case. Finally, Part D concludes that the court ignored precedent in its assertion that it could not calculate damages.

#### *A. Background of Postwar Germany and Reparations Treaties*

Immediately after the Nazi Army surrendered to the Allies on May 8, 1945, the Allies' primary objective was to ensure that Germany would no longer be a threat.<sup>61</sup> The United States, Great Britain, France and the Soviet Union agreed to divide Germany into four shares.<sup>62</sup> Each country was responsible for demilitarizing and dismantling the industrial capabilities of its respective portion of the country.<sup>63</sup> Under the Potsdam Agreement these nations agreed to seize the industrial equipment and machinery from inside their occupied zones to satisfy the reparations owed by Germany.<sup>64</sup>

In 1946, the United States and seventeen other nations<sup>65</sup> met in Paris to finalize an agreement on the seizure and distribution of

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<sup>60</sup> This Note addresses three issues the Burger-Fischer court raised in its dismissal of the case. Because the court found the case nonjusticiable under the political question doctrine and did not discuss the statute of limitations, jurisdiction, or other issues raised by the parties, neither will this Note.

<sup>61</sup> See *Iwanowa v. Ford Motor Co.*, 57 F. Supp. 2d 41 (D.N.J. 1999), *amended by* 67 F. Supp. 2d 424, 447 (1999).

<sup>62</sup> See *id.* at 447-48.

<sup>63</sup> See *id.*

<sup>64</sup> See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 265 (D.N.J. 1999).

<sup>65</sup> See *Iwanowa*, 67 F. Supp. 2d at 448 (1999). The nations party to the Agreement on Reparation from Germany include Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, South Africa, the United Kingdom, the United States and Yugoslavia.

reparations.<sup>66</sup> The signing of the Paris Reparations Treaty allowed the signatory nations to obtain a percentage of the total assets collected by the Western Powers, according to the war-related damages each nation incurred.<sup>67</sup> The nations agreed that the reparations received would "cover all its claims and those of its nationals against the former German Government and its Agencies,<sup>68</sup> of a governmental or private nature arising out of the war."<sup>69</sup>

However, before the Paris Reparations Treaty could be implemented, a controversy between the Western Powers and the U.S.S.R. emerged.<sup>70</sup> At the same time, citizens of the nations party to the treaty began to complain of the high costs of food and other aid being sent to Germany.<sup>71</sup> It was expensive for the United States, France and the United Kingdom to keep Germany in a collapsed economic state.<sup>72</sup> Fearing that the seizure of industrial assets from the already bankrupt state would completely impair Germany's ability to rebuild its economy,<sup>73</sup> the Western Powers discontinued the reparations program by May of 1946.<sup>74</sup>

To assist Germany in rebuilding its economy the Western Powers began negotiations of the London Debt Agreement<sup>75</sup> and the Transition

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<sup>66</sup> Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 [hereinafter Paris Reparations Treaty].

<sup>67</sup> See *Iwanowa*, 67 F. Supp. 2d at 449 (citing Paris Reparations Treaty, pt. I, art. 1.A, pt. III).

<sup>68</sup> "Agencies" has been consistently interpreted to include private corporations that employed slave laborers. See, e.g., *Iwanowa*, 67 F. Supp. 2d at 454. The parties in the case agree that had the Paris Reparations Treaty been implemented plaintiffs' claims would have been subsumed. See *id.* at 460; see also *Burger-Fischer*, 65 F. Supp. 2d at 277. Also note that the treaty set up a fund to cover those who were stateless at the conclusion of the war thus their claims would most likely be extinguished as well. See *id.* at 277.

<sup>69</sup> Paris Reparations Treaty, *supra* note 66, 61 Stat. at 3163, T.I.A.S. 1655.

<sup>70</sup> See *Iwanowa*, 67 F. Supp. 2d at 451.

<sup>71</sup> See *id.* at 451.

<sup>72</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 266.

<sup>73</sup> See *id.* at 265.

<sup>74</sup> See *Iwanowa*, 67 F. Supp. 2d at 451.

<sup>75</sup> See *id.* at 452-53. Parties to the London Debt Agreement included the Federal Republic of Germany on one side and Belgium, Canada, Ceylon, Denmark, France, Greece, Iran, Ireland, Italy, Liechtenstein, Luxembourg, Norway, Pakistan, Spain, Sweden, Switzerland, South Africa, the United Kingdom, the United States, and Yugoslavia on the other. The London Debt Agreement is formally known as the Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 444, 333 U.N.T.S. 3 [hereinafter London Debt Agreement].

Agreement.<sup>76</sup> The London Debt Agreement set forth a list of debts owed by Germany along with a payment schedule. Reparation claims were deferred under article 5(2), including those of slave laborers against private industries.<sup>77</sup> The Transition Agreement, a series of agreements negotiated between 1952 and 1954, also addressed reparations.<sup>78</sup> The Transition Agreement shifted to Germany the responsibility of enacting appropriate legislation to compensate Nazi victims and to establish a Supreme Restitution Court to process the claims.<sup>79</sup> However, on its face the Transition Agreement did not purport to resolve all reparation claims, and the Western Allies agreed that "the problem of reparations shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning the matter."<sup>80</sup>

On September 12, 1990, the Federal Republic of Germany and the German Democratic Republic along with the United States, the United Kingdom, France and the U.S.S.R. entered the final peace treaty.<sup>81</sup> This treaty, known as the Two Plus Four Treaty, reunified Germany on March 15, 1991.<sup>82</sup> The treaty was silent on the issue of reparations.

### *B. Postwar Treaty Analysis*

Ignoring the basic rules of treaty interpretation, the *Burger-Fischer* court concluded that the Transition Agreement and the German legislation enacted pursuant thereto subsumed plaintiffs' slave labor claims.<sup>83</sup> The court reasoned that because the earlier Potsdam and Paris Agreements

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<sup>76</sup> The Transition Agreement is a series of agreements negotiated between 1952 and 1954 in Bonn and Paris. Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, 332 U.N.T.S. 219.

<sup>77</sup> See Article 5(2) of the London Debt Agreement, stating "Consideration of claims arising out of the Second World War by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich [or] agencies of the Reich...shall be deferred until the final settlement of the problem of reparations." London Debt Agreement, *supra* note 75, at art. 5(2); see also *Iwanowa*, 67 F.Supp. 2d. at 454. The Supreme Court of Germany has ruled that claims against private industries that employed slave laborers fall under "agencies of the Reich." *Id.* (citing *Stauder*, BGH (1963) at 3). This is supported by the history surrounding negotiations of the London Debt Agreement.

<sup>78</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 278.

<sup>79</sup> See *id.* at 268.

<sup>80</sup> Convention (with Annex) on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, ch. 6, art. 1, 6 U.S.T. 4411, 4489, 332 U.N.T.S. 219, 278 [hereinafter Transition Agreement].

<sup>81</sup> The Two Plus Four Treaty is officially known as the Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, S. TREATY DOC. NO. 101-20, 29 I.L.M. 1196.

<sup>82</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 256.

<sup>83</sup> See *id.* at 278.

encompassed plaintiffs' claims, the Transition Agreement must have covered the claims as well.<sup>84</sup> To arrive at this conclusion, the court made two errors that are discussed below. First, the court misinterpreted the postwar treaties by disregarding the plain meaning of the language of the treaties and overlooking the context of the postwar treaty negotiations. Second, the court ignored the intentions of the signatory nations. Thus, the court condoned a discriminatory reparations scheme that enriched German industries at the expense of thousands of innocent slave laborers.

### 1. Treaty Interpretation

Treaty interpretation follows the general rules of construction applied to contracts.<sup>85</sup> A treaty "is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose."<sup>86</sup> Thus, a court must begin by looking to the text and construing the words according to their literal meaning. A court may not add to or modify a treaty but may look to extrinsic evidence, such as the historical context and intent of the parties, to aid in its interpretation.<sup>87</sup> The *Burger-Fischer* court disregarded all standard treaty interpretation principles.

The Transition Agreement provides that "the problem of reparations shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements governing the matter."<sup>88</sup> This language, construed in its ordinary meaning clearly states that the Transition Agreement is not the final word on reparations. No evidence supports a contrary conclusion. Yet, the *Burger-Fischer* court reasoned that because there was no mention of reparations in the final peace treaty,<sup>89</sup> the

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<sup>84</sup> See *id.*

<sup>85</sup> See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 457 (1999) (stating that a treaty is a contract between nations); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 446 U.S. 243, 262 (1984) (Stevens, J., dissenting) (arguing that basic rules of contract interpretation apply to treaties).

<sup>86</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987).

<sup>87</sup> See *Iwanowa*, 67 F. Supp. 2d at 457 (citing *Air France v. Saks*, 470 U.S. 392) (stating that if the treaty's written language is ambiguous the court may rely on extrinsic evidence and may also look to history to find the parties' intentions).

<sup>88</sup> Transition Agreement, *supra* note 81, ch. 6, art. 1, 6 U.S.T. 4411, 4489, 332 U.N.T.S. 219, 278.

<sup>89</sup> See *Burger Fischer*, 65 F. Supp. 2d at 256. Defendants argue that the signatories failed to mention reparations in the final peace treaty because all claims against Germany and its nationals had been resolved through the Transition Agreement and bilateral treaties. However, plaintiffs contend that the Two Plus Four Treaty could not subsume slave labor claims because they are not reparations claims. Plaintiffs are seeking unjust profits earned by private industries, which are claims that the Two Plus Four Treaty does not intend to

Transition Agreement, as the last word on reparations, governs plaintiffs' claims.<sup>90</sup> The court noted that "the Transition Agreement left open the possibility of further reparation provisions."<sup>91</sup> Because the final peace treaty did not address the reparations issue, the Transition Agreement did not suddenly subsume all claims, but continued to leave the issue unsettled.

Not only did the *Burger-Fischer* court erroneously find that the Transition Agreement governed reparations claims, but the court also concluded that all private claims, including those of slave laborers, are subsumed under the Transition Agreement.<sup>92</sup> Again disregarding the standard rules of treaty interpretation, the court asserted that because the earlier Potsdam and Paris Agreements covered plaintiffs' claims, so too does the Transition Agreement.<sup>93</sup> However, the rules of treaty interpretation provide that every provision must be given effect, and if there is an unresolvable conflict between the language of two or more treaties pertaining to the same subject matter, the latter governs.<sup>94</sup> The Transition Agreement does not provide for the final disposal of reparation claims.

The plaintiffs did not dispute that had the Potsdam or Paris Reparations Treaty been fully implemented plaintiffs' claims would have been extinguished.<sup>95</sup> The Potsdam Agreement of 1945 and the Paris Treaty of 1946 aimed to eliminate Germany's capability to wage war by dividing up the industrial assets among the allied nations.<sup>96</sup> The nations agreed that the manufacturing equipment they received would serve as reparations for the Nazi victims, thereby resolving all wartime claims against Germany and its industries.<sup>97</sup> However, as plaintiffs' correctly argue, the London Debt

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subsume. To support this argument plaintiffs rely on a ruling by the German Federal Constitutional Court that found that the Two Plus Four Treaty did not extinguish slave labor claims. Finally, plaintiffs assert that the treaty could not subsume the claims of stateless persons because no state had the authority to handle their claims. *See also* Bazylar, *supra* note 9, at 215 (citing three German Court decisions finding private slave labor claims ripe due to the signing of the Two Plus Four Treaty).

<sup>90</sup> *See Burger-Fischer*, 65 F. Supp. 2d at 278-79.

<sup>91</sup> *Id.* at 279.

<sup>92</sup> *See id.* at 278.

<sup>93</sup> *See id.*

<sup>94</sup> *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 30(3), 1155 U.N.T.S. 331.

<sup>95</sup> *See Burger-Fischer*, 65 F. Supp. 2d at 256.

<sup>96</sup> *See id.* at 265-66.

<sup>97</sup> *See* Paris Reparations Treaty, *supra* note 66, 61 Stat. at 163, T.I.A.S. 1655, which says that "[t]he Signatory Governments agree among themselves that their respective shares of reparation as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war."

Agreement of 1953 altered this reparations scheme.<sup>98</sup> Mounting tensions with Russia and pressure from the citizens of allied nations who did not fancy the idea of shipping food and supplies to Germany caused the Western Powers to halt the dismantling of German industries in order to allow Germany to rebuild its economy.<sup>99</sup> Additionally, the Western Powers set forth a plan to assist Germany in the payment of its debts while simultaneously allowing the war-torn nation to establish economic stability.<sup>100</sup> This debt repayment plan is known as the London Debt Agreement.

The London Debt Agreement deferred war-related claims against Germany and its nationals until "the final settlement of the problem of reparations."<sup>101</sup> Despite this clear language and the historical context of the treaty negotiations, the *Burger-Fischer* court rejected plaintiffs' assertion that the London Debt Agreement "temporarily relieved German corporate defendants of the burden of responding to individual claims arising out of World War II in order to permit them to regain their financial health."<sup>102</sup> The court contended that the London Debt Agreement dealt only with German debt, not the reparation claims, and was therefore irrelevant to this case.<sup>103</sup> Again the court overlooked the text of the treaty, the historical context and the intent of the signatories. First, the treaty clearly states in article 5(2) that claims against "agencies of the Reich...shall be *deferred* until the final settlement of the problem of reparations."<sup>104</sup> German courts have found this language to include claims brought by slave laborers against private corporate defendants.<sup>105</sup> Additionally, history of the treaty negotiations shows that slave labor claims were discussed in the drafting of article 5(2) of the London Debt Agreement.<sup>106</sup> The court's conclusion is implausible. Because the Allied nations discontinued their plan to collect reparations through dismantling of German industries, they purposefully included a provision preserving and deferring their right to seek reparations from Germany and its industries until a later date. Any other interpretation would render article 5(2) meaningless.

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<sup>98</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 256.

<sup>99</sup> See *id.* at 264-67.

<sup>100</sup> See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 452-53 (1999).

<sup>101</sup> London Debt Agreement, *supra* note 75, at art. 5(2).

<sup>102</sup> *Burger-Fischer*, 65 F. Supp. 2d at 279.

<sup>103</sup> See *id.* at 277-78.

<sup>104</sup> London Debt Agreement, *supra* note 75, at art. 5(2) (emphasis added).

<sup>105</sup> See *Iwanowa*, 67 F. Supp. 2d at 456 (noting that the German Supreme Court which has construed article 5 of the London Debt Agreement to include a deferral of reparations for private corporations that used forced labor during the war as well as the claims against the government).

<sup>106</sup> See *id.* (citing *Staucher*, BGH[Supreme Court], VI ZR 186/71 at 3 (1963)[F.R.G.]).

Yet the *Burger-Fischer* court alleges that this argument, asserted by the plaintiffs “ignores the Transition Agreement of 1954 which dealt extensively and definitively with reparations and misconstrues the London Debt Agreement which dealt primarily, as its name implies, with the restructuring of German debt.”<sup>107</sup> First, as stated above, the London Debt Agreement did refer to reparations and the payment of claims brought by victims against Germany and its industries. Payments to slave labor victims were part of the debt owed by Germany and its industry to other nations. If reparations were not part of the German debt, the Transition Agreement, which mandates such payments, would never have been enacted. Second, plaintiffs’ argument does not ignore the Transition Agreement. In fact, the language of the London Debt Agreement that defers reparations is consistent with a similar provision in the Transition Agreement that states that final reparation problems will be dealt with in the final peace treaty.<sup>108</sup> The rules of treaty interpretation require that two treaties dealing with the same subject matter be interpreted together unless inconsistencies occur. Because the London Debt Agreement and the Transition Agreement were negotiated simultaneously by many of the same nations, they are most likely intended to be interpreted together.

After taking effect in 1955, the Transition Agreement shifted the reparations responsibilities to Germany to enact appropriate legislation to “adequately” compensate Nazi victims. Because the Transition Agreement contained a provision that deferred the final settlement of reparations until the final peace treaty, it is in direct conflict with the earlier Potsdam and Paris Treaty that subsumed all claims.<sup>109</sup> Following the rules of treaty interpretation the court should have concluded that the Transition Agreement superseded the earlier treaties and that reparation claims were not covered by the Transition Agreement.

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<sup>107</sup> *Burger-Fischer*, 65 F. Supp. 2d at 277-78.

<sup>108</sup> See Transition Agreement, *supra* note 80, ch. 6, art. 1, 6 U.S.T. 4411, 4489, 332 U.N.T.S. 219, 278.

<sup>109</sup> Yet the *Burger-Fischer* court believed that just a few short years after the end of the war the Allied Nations would turn the entire compensation program over to Germany. While it is clear that Germany was to implement legislation and enact a court to deal with reparations claims, the Allied Nations purposefully included in the Transition Agreement a provision that deferred final reparations problems until the final peace treaty. I would argue that the Allied Nations’ purpose for including this provision was to ensure that victims who fell through the cracks of the German legislation would be compensated at a later time. Therefore, the slave labor plaintiffs in *Burger-Fischer* are the perfect example of the class of victims the deferral of reparations provision was designed to protect.



## 2. Intentions of Signatory Nations

The *Burger-Fischer* court overlooked the intentions of the signatories manifested in the Transition Agreement as well.<sup>110</sup> The Western Allies articulated a set of standards for Germany to follow in the formulation and implementation of the reparations legislation enacted pursuant to the Transition Agreement.<sup>111</sup> Germany failed to meet at least two of these standards.

First, the Allies required that restitution be paid without discrimination against classes of victims.<sup>112</sup> However, the Federal Republic of Germany enacted laws to compensate only victims of stolen property, financial losses, physical injury, and death.<sup>113</sup> Politics, prejudicial sentiments, and inadequate representation left many groups of persecutes, including slave laborers, without a legal means to collect reparations.<sup>114</sup> The government of Germany had no intention in 1956 of compensating victims who seek restitution for slave labor performed for private industries, nor does it today.<sup>115</sup> When victims sought compensation under the Transition Agreement from the German government, their claims were rejected under the London Debt Agreement, which deferred reparations until the final peace treaty.<sup>116</sup>

Second, the Transition Agreement required Germany to implement a reparations scheme that recognized the difficulties Nazi victims would

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<sup>110</sup> The Supreme Court has emphasized the importance of the intent of the parties in treaty interpretation. See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. LAW REV. 953, 966 (1994) (citing *Maximov v. U.S.*, 373 U.S. 49, 54 (1963) (emphasizing that "[t]he treaty's text does not control if application of the words of the treaty according [to] their obvious meaning effects a result inconsistent with the intent or expectations of its signatories"))).

<sup>111</sup> See Transition Agreement, *supra* note 80, pt. IV, art. 16, 6 U.S.T. 4411, 4550, 332 U.N.T.S. 219, 328.

<sup>112</sup> See *id.*

<sup>113</sup> See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 270 (D.N.J. 1999) (noting that German laws enacted pursuant to the Transition Agreement provide compensation only for "death, physical injury, property damage, financial loss and loss caused to professional or economic life. Slave or forced labor was not an injury for which compensation could be sought per se.").

<sup>114</sup> See CHRISTIAN PROSS, *PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR* 52 (Belinda Cooper trans., 1998). Other groups left without compensation under the German legislation were those who were persecuted outside Germany and didn't meet the residency requirements, victims of sterilization, communists, Gypsies, and homosexuals. *Id.*

<sup>115</sup> See *What It Was Like to be a Forced Laborer According to German Negotiators* (visited Oct. 19, 1999) <[http://www.cmht.com/slave\\_labor/czechpole2.htm](http://www.cmht.com/slave_labor/czechpole2.htm)>.

<sup>116</sup> See PROSS, *supra* note 114, at 52.

have in obtaining evidence.<sup>117</sup> The German government also violated this standard. Instead of considering the evidentiary difficulties the victims may have, Germany designed reparations laws which gave the officials a plethora of excuses to deny and postpone victims' claims.<sup>118</sup> With many former Nazi officials in charge of the reparations programs,<sup>119</sup> the restitution laws and administration were implemented to frustrate claimants.<sup>120</sup> The laws were unduly complex containing countless provisions, "grounds for exclusion, deadlines, and harassing demands" to create a system in which settlements were minimized.<sup>121</sup> For example, one section provides that anyone who "purposely or negligently provides incorrect or misleading information" regarding injuries suffered will not receive reparations.<sup>122</sup> This provision applied to even minor mistakes of information. "Because many victims could no longer remember dates and times, and few documents remained available, they became entangled in contradictions. If officials were able to find contradictions[,] . . . they were refused reparations."<sup>123</sup>

Despite these deficiencies in the implementation of the Transition Agreement, the *Burger-Fischer* court found that if any remedy was available to the plaintiffs, relief was to be sought under the Transition Agreement and subsequent German legislation.<sup>124</sup> In other words, the court stated that under the terms of the treaty, the victims' only channel for recovery lay under the German legislation, even though it was inadequate to this end. The court stated that despite some "gaps" in the German legislation, the "substance of reparations" was included in the Transition Agreement and Germany fulfilled their duties by enacting the required legislation.<sup>125</sup> The court thereby legitimized a system of reparations that fails to acknowledge the moral obligation owed by Germany<sup>126</sup> to the Nazi

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<sup>117</sup> See Transition Agreement, *supra* note 80, pt. IV, art. 16, 6 U.S.T. 4411, 4550, 332 U.N.T.S. 219, 328. Due to the war, documents were lost and witnesses disappeared; thus, the allied nations intended Germany to implement a compensation program that took such evidentiary problems into account.

<sup>118</sup> See PROSS, *supra* note 114, at 45.

<sup>119</sup> See *id.* at 18.

<sup>120</sup> See *id.* at 175-76.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 56.

<sup>123</sup> *Id.*

<sup>124</sup> See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 278 (D.N.J. 1999).

<sup>125</sup> *Id.* at 279.

<sup>126</sup> See PROSS, *supra* note 114, at 16. Reparations were seen as important by very few in Germany. A few politicians, lawyers, journalists and scholars shared the opinion that victims of the Holocaust, including slave laborers, should be compensated. In reality, the most avid opponent of reparations, the Finance Ministry, was in charge of the legislation. The Finance Ministry viewed reparations as the price to pay for the U.S. to accept the

victims and directs plaintiffs to seek relief under laws that do not compensate slave laborers.

### C. Political Question Doctrine

The second erroneous basis for dismissal in *Burger-Fischer* was the court's reliance on the political question doctrine.<sup>127</sup> Under the political question doctrine, the judicial branch is constrained from reviewing certain issues that the political branches of government control.<sup>128</sup> Many scholars criticize the political question doctrine because its wholly discretionary nature allows courts to avoid deciding important legal matters.<sup>129</sup>

The *Burger-Fischer* court found plaintiffs' case nonjusticiable because the legal issues raised foreign policy questions that had been allocated to the President under the Constitution.<sup>130</sup> Proclaiming an inability to adjudicate the adequacy of the reparations provided under the postwar treaties, the Court cited two outdated cases from the first half of the twentieth century to support its position that a court has no role in the examination of foreign affairs.<sup>131</sup>

However, more recent case law demonstrates that the judiciary does have the power to interpret treaties and render decisions that may affect the political branches' actions in the international arena.<sup>132</sup> In 1986, the

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Federal Republic of Germany in the community of Western Nations and for the world's Jewish population to "accept the German economy and its products as participants in world trade." *Id.* In fact, the attitude of Germany's top officials in the early 1960's was that the postwar period was over, limitations of filing of claims would not be extended, and the Nazi crimes would not be used as political pawns forever.

<sup>127</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 282-85.

<sup>128</sup> See David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1442-43 (1999).

<sup>129</sup> See *id.*; see also Paul Hoffman et al., *Panel III: War Crimes and Other Human Rights Abuses in the Former Yugoslavia*, 16 WHITTIER L. REV. 433 (1995) (analyzing doctrines of avoidance such as the political question doctrine). Scholars also argue that the political question doctrine is unnecessary since the Constitution allocates the power between the branches and that courts should abstain from deciding cases that they are Constitutionally forbidden to decide. See also Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597-98 (1976); David J. Bederman, Book Review, 7 EMORY INT'L LAW REV. 693, 698 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?*).

<sup>130</sup> See *Burger-Fischer*, 65 F. Supp. 2d at 282-83.

<sup>131</sup> See *id.* at 283 (citing *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) and *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

<sup>132</sup> The Alien Torts Claims Act, 28 U.S.C. § 1350 (1994), and the Torture Victim Protection Act, 28 U.S.C. § 1350 (1994), are examples of Congress intending courts to hear international law cases. See also *Kadic v. Karadzic*, 70 F.3d 232, 248-50 (2d Cir. 1995)

Supreme Court articulated that “courts have the power to construe treaties<sup>133</sup> and executive agreements . . . and we cannot shirk this responsibility merely because our decision may have significant political overtones.”<sup>134</sup>

Reasoning that the undoing of the reparations scheme authorized by the Executive Department and Senate would be an embarrassment to the political branches, the *Burger-Fischer* court dismissed the case.<sup>135</sup> Yet with the Executive Branch engaged in negotiations with the defendants and several other German corporations to set up a settlement fund to compensate slave laborers, a finding adverse to defendants would have aided the Executive Branch’s position in the negotiations. Instead, the *Burger-Fischer* court established a precedent and sent the message to German industries that they could not be held liable in U.S. courts, thereby decreasing German corporations’ incentive to reach an agreement to establish a compensation fund. Furthermore, the Executive Branch was aware of the *Burger-Fischer* litigation and would have made its concerns known to the court had the case concerned significant foreign policy relations.<sup>136</sup>

The preeminent case relating to the political question doctrine, and cited by the *Burger-Fischer* court is *Baker v. Carr*.<sup>137</sup> *Baker v. Carr* sets forth a six-factor test that courts apply to determine whether to invoke the political question doctrine.<sup>138</sup> The six factors include: (1) Constitutional commitment of the issue to another branch of government; (2) lack of respect to the coordinate branches of government; (3) potential for embarrassment for multifarious pronouncements by various departments on one question; (4) lack of judicially discoverable and manageable standards for deciding issues; (5) impossible to resolve without “an initial policy determination of a kind clearly for non-judicial discretion,” and; (6) an “unusual need for unquestioning adherence to a political decision already

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(failing to invoke the political question doctrine to dismiss action brought against Bosnian Serb leader under the Alien Tort Claims Act even though the issue affects foreign policy).

<sup>133</sup> See generally Bederman, *supra* note 110, at 957. The Constitution does not regulate the judiciary’s interpretation of treaties.

<sup>134</sup> Bederman, *supra* note 128, at 1444-45 (quoting *Japan Waling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

<sup>135</sup> See *Burger-Fischer*, 65 F. Supp. at 284-85.

<sup>136</sup> See Bazyler, *supra* note 9, at 231.

<sup>137</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>138</sup> See *id.* at 217.

made.”<sup>139</sup> The court concluded that all six factors were satisfied in the present case, but failed to provide a coherent analysis of the factors.<sup>140</sup>

Instead of applying the *Baker v. Carr* test to the facts of the *Burger-Fischer* case in a logical fashion, the court drew the sweeping conclusion that it was being asked to reformulate the entire set of postwar treaties. In justifying the application of the political question doctrine, the *Burger-Fischer* court thereby wrongly classified plaintiffs’ case as one against a major portion of Germany’s industry, citing over forty companies that potentially employed slave laborers.

Plaintiffs correctly defined their case as private parties suing private industries;<sup>141</sup> former slave laborers seeking compensation from the companies they were forced to work for and restitution for the unjust enrichment that fell to defendants as a result of their unpaid labor. However, the *Burger-Fischer* court found the case to be a public law claim due to the enormous financial effect that a judgment, adverse to the defendants, would have on the German economy.<sup>142</sup> Going beyond the scope of the case before it and speculating about potential future law suits, the court found that many of the largest German corporations employed “a substantial portion of the industrial slave laborers” and that to hold defendants liable “in the aggregate” would allow other slave laborers to recover from other German corporations which would adversely affect the entire German economy.<sup>143</sup> However, neither the state of the German economy nor the ability of potential future defendants to satisfy adverse judgments should have been a concern of this court. By redefining plaintiffs’ case as one affecting the entire German economy rather than focusing on the parties before it, the court found the case nonjusticiable under the political question doctrine.

#### D. Damages

Third, the *Burger-Fischer* court erroneously declined to adjudicate this case because of an alleged inability to calculate damages due to lack of an applicable standard.<sup>144</sup> The court could not determine a compensation formula that would fairly provide reparations for all those who have claims against German industries.<sup>145</sup> Again, the court looked past the parties in this case and questioned how one court could divide the German assets

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<sup>139</sup> *Burger-Fischer*, 65 F. Supp. 2d at 282. If a case fails only one of the six factors the political question doctrine should be invoked.

<sup>140</sup> *See id.*; *see also* Bazylar, *supra* note 9, at 229.

<sup>141</sup> *See Burger-Fischer*, 65 F. Supp. 2d at 281.

<sup>142</sup> *See id.* at 281-82.

<sup>143</sup> *Id.* at 282.

<sup>144</sup> *See id.* at 284.

<sup>145</sup> *See id.*

among all those who deserve reparations.<sup>146</sup> However, the court posed the wrong question. The *Burger-Fischer* court should have asked how a reparations formula could be devised to award these plaintiffs compensation and whether there was precedent to guide that decision. If the court had focused on the parties in this case instead of trying to reformulate the entire series of postwar treaty negotiations and reparation agreements, the court's task would have been much less arduous.

To compensate the plaintiffs the court could have devised a basic formula to pay the laborers for the amount of time they worked. By simply multiplying the number of hours worked by the standard rate of pay for the type of labor performed during the relevant time period and adding on interest, the court could have reduced the unjust benefit that defendants received from the atrocities they committed. In its discretion the court could have also chosen to add on additional punitive damages for the abuses suffered by the plaintiffs, including the detestable working and living conditions they were forced to endure.

The *Burger-Fischer* court's assertion that it had no standard to apply to compensate plaintiffs is unfounded. Calculating damages in international human rights cases is comparable to calculating damages in any other case.<sup>147</sup> If plaintiffs provided enough evidence of their injuries and established the liability of the defendants for causing such injuries, it is the court's duty to devise a reasonable compensation scheme so that plaintiffs are appropriately remedied and defendants are not unjustly enriched. Furthermore, United States federal courts in the Swiss and Austrian banking litigation stepped up to the challenge of determining a just allocation of damages for victims and their heirs.<sup>148</sup>

The *Burger-Fischer* court could have followed the approach taken in *Filartiga v. Pena-Irala*.<sup>149</sup> In *Filartiga*, a Paraguayan government agent tortured the son of the plaintiffs, who brought an action in the Second Circuit under the Alien Tort Claims Act.<sup>150</sup> To determine damages the

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<sup>146</sup> See *id.*

<sup>147</sup> See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 213 (1996).

<sup>148</sup> See Bazylar, *supra* note 9, at 230 (stating that in addition to allocating damages in the Holocaust banking cases, U.S. courts have "repeatedly undertake[n] similar tasks, ranging from complex multidistrict litigation cases involving airline crashes or securities fraud, to wide-ranging products liability class action lawsuits involving tobacco, drugs, or other consumer products"); see also, *Swiss Bank Settlement* (visited Aug. 7, 2000) <<http://www.cmht.com/casewatch/cases/sbsettle.htm>> (stating that the judge in the Swiss Bank settlement examined statements offered by potential class members and held fairness hearings to find the \$1.25 billion settlement fair and equitable. Additionally, the judge appointed a special master to develop a plan for distributing the money to the victims).

<sup>149</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>150</sup> See *id.*

Second Circuit applied choice of law principles focusing on the place where the relationship between the parties was centered.<sup>151</sup> Finding that Paraguayan law did not provide an adequate remedy because it did not allow for punitive damages the *Filartiga* court provided a remedy that fulfilled the international community's objection to torture.<sup>152</sup> Because a violation of international law is an offense to all humanity, the trial court awarded the Filartiga family \$10 million<sup>153</sup> in punitive damages, stating that punitive damages must be awarded in an amount that will deter others from committing such outrageous crimes against humanity.<sup>154</sup>

The *Burger-Fischer* court acknowledged that defendants violated customary international law;<sup>155</sup> thus, the court should have followed the compensation scheme set forth in *Filartiga* to provide plaintiffs with some form of relief. While there is little to guide courts on what constitutes a reasonable damage award, many courts have faced this challenge and have compensated victims of international human rights violations by awarding them millions, and occasionally even billions of dollars.<sup>156</sup> The dismissal of plaintiffs' case on the basis of the postwar treaties, the political question doctrine or an alleged inability to calculate damages was improper. The court should have found that the Transition Agreement governed but did not subsume plaintiffs' slave labor claims. Because the Transition Agreement provides the last word on war reparations by deferring final reparation issues until a peace treaty is signed, victims' claims against German private industries are still alive since the final treaty did not mention reparation issues. Plaintiffs' claims were not subsumed by the Transition Agreement as the *Burger-Fischer* court decided. The German legislation enacted pursuant to the Transition Agreement intentionally excluded slave labor claims because the German government viewed the claims as a responsibility of the corporations. By dismissing the case, the court condoned Germany's inadequate and discriminatory legislation and allowed defendants to entirely escape responsibility for their wartime atrocities.

The *Burger-Fischer* court also should have rejected the applicability of the political question doctrine to this case. One reason to invoke the doctrine is to avoid embarrassing the executive branch through a decision adverse to international negotiations. In this case, by applying the

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<sup>151</sup> See STEPHENS & RATNER, *supra* note 147, at 211-13.

<sup>152</sup> See *id.*

<sup>153</sup> Exact damage award is \$10,385,364. See STEPHENS & RATNER, *supra* note 147, at 344.

<sup>154</sup> See *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

<sup>155</sup> See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 255 (D.N.J. 1999).

<sup>156</sup> See STEPHENS & RATNER, *supra* note 147, at 343-48 (providing a more detailed list of damage awards in eleven human rights cases, including *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995)).

political question doctrine the court did exactly what it sought to avoid. During a course of critical negotiations to establish a settlement fund for slave laborers between the German industries and the U.S. Government, the District Court of New Jersey held that German corporations could not be held liable in U.S. courts, thus weakening the bargaining position of the United States.

Finally, the court incorrectly declined to calculate damages for the plaintiffs by viewing the case as a complex issue of war reparations involving sophisticated government-to-government negotiations. Instead, the court should have looked at this case as a severe human rights abuse for which victims have gone uncompensated under the applicable postwar treaties, while defendants profited by forcing plaintiffs to toil under brutal and inhumane conditions. Turning to precedent from other human rights cases or simply multiplying out the amount of back pay plus interest, the court could have arrived at a judgment for the plaintiffs.

#### IV. CONCLUSIONS

A dismissal in the *Burger-Fischer* case not only affects Zelig Preis and the class he represents, but also makes outstanding claims of other Holocaust victims more difficult to litigate. Although a settlement fund has been established for slave labor victims of German industries, there are at least 313 Austrian companies that exploited Polish slave laborers,<sup>157</sup> and the "entire Japanese manufacturing, shipping, mining, steel and construction industries" have been sued by prisoners of war and civilians who were forced to labor for Japanese firms.<sup>158</sup> Additional suits have been brought against European banks and insurance companies for profiting from wartime dormant accounts and policies.<sup>159</sup> The *Burger-Fischer* decision will more than likely have an adverse effect on Holocaust victims in future cases as well.

One may presume that although the *Burger-Fischer* court dismissed plaintiffs' case, the slave labor victims will not go uncompensated. The \$4.8 billion settlement fund will punish the companies and provide plaintiffs with the restitution they seek. Or will it? With the industries responsible for only half of the fund<sup>160</sup> and over 3,000 firms contributing,<sup>161</sup>

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<sup>157</sup> See Austrian Companies Exploited Forced Laborers (visited Sept. 23, 2000) <[http://www.cmht.com/slave\\_labor/ausco.htm](http://www.cmht.com/slave_labor/ausco.htm)>.

<sup>158</sup> *California Suits Target Japanese Corporations*, *supra* note 30, at 575.

<sup>159</sup> See *A Slave-Labour Settlement*, *supra* note 18, at 44.

<sup>160</sup> See Stuart Eizenstat, *The Healing Power of Truth: Germany is Setting the Right Example by Confronting its Past Horrors Through its Holocaust Compensation*, FINANCIAL TIMES (LONDON), Jan. 11, 2000 at 17, available in LEXIS, News Library.

<sup>161</sup> See Marilyn Henry, *Germany Said Ignoring Terms of Slave-Labor Deal*, JERUSALEM POST, Jan. 9, 2000, at 3, available in LEXIS, News Library.



the amount each will pay will be a nominal amount in proportion to their total assets. Many former forced laborers argue that their expected payment of less than \$5,000 each<sup>162</sup> is too little too late.<sup>163</sup> They want the German industry to "acknowledge its moral responsibility," and they feel that "a generous settlement is part, but only part, of that."<sup>164</sup> Slave laborers feel that instead of an apology they have been "offered a paltry sum" of money which "firms [can] offset . . . against tax and end up hardly out of pocket."<sup>165</sup>

No amount of money can make the Holocaust victims "whole," but money is not what most victims seek.<sup>166</sup> Slave laborers want the German industries to acknowledge their wartime atrocities and apologize.<sup>167</sup> Unfortunately the settlement fund does not mandate industries to express any moral wrongdoing. In reality, most German and U.S. companies are joining the fund to buy protection from future lawsuits and to shield themselves from negative publicity regarding their participation with the Nazi regime.<sup>168</sup> During negotiations for the fund corporate representatives and government officials expressed sentiments such as "[w]e don't care how many survivors there are or how much they get . . . we only care about how much we have to pay"<sup>169</sup> and "[w]e don't understand what all of this fuss is about; we fed them, we clothed them, we sheltered them, and the fact that they survived is a testament to how well they were treated."<sup>170</sup> Given the pervasiveness of sentiments such as these, it is unlikely that Holocaust victims or their heirs will ever receive the apology or justice they deserve.

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<sup>162</sup> See *A Slave Labour Settlement*, *supra* note 18, at 44.

<sup>163</sup> See *id.*; see also Hayden, *supra* note 13, at 11.

<sup>164</sup> Johnson, *supra* note 36, at 22.

<sup>165</sup> *Id.*; but see *German Industry Faces Up to Past*, *supra* note 24 (stating that the establishment of the compensation fund reflects a "moral responsibility" owed by German industry and while not a lot of money, is a respectable amount especially for persons in Eastern Europe).

<sup>166</sup> Johnson, *supra* note 36, at 22.

<sup>167</sup> See *id.*

<sup>168</sup> See Hayden, *supra* note 13, at 11.

<sup>169</sup> *Id.* (quoting a Deutsche Bank official).

<sup>170</sup> Cohen, Milstein, Hansfield & Toll's e-journal, *Czechoslovakian and Polish Forced Laborers* (visited Oct. 19, 1999) <<http://www.cmht.com/slave-labor/czechpole.htm>>.